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Supreme Court, U.S.

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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROBERT FALANGA and RONALD CHALKER,

Petitioners,

vs.

STATE BAR OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT FALANGA; RONALD CHALKER; and RALPH STEVEN GOLDBERG, Plaintiffs,	CASE NO. 1:95-cv-2160-GET
v.	
THE STATE BAR OF GEORGIA, Defendant.	

ORDER

(Filed Jul. 18, 1996)

The above-styled matter is an action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of certain rules governing the practice of law in the State of Georgia. The action came on for a non-jury trial commencing on May 6, 1996.

Findings of Fact and Conclusions of Law

1.

Plaintiffs are attorneys licensed to practice law in the State of Georgia. Defendant is the State Bar of Georgia. The State Disciplinary Board of the State Bar is authorized by the Supreme Court of Georgia to investigate, discipline and punish members of the State Bar of Georgia, and those licensed to practice law in Georgia, for violations of the Standards of Conduct set forth in Bar

Rule 4-102. Rules governing attorney disciplinary proceedings are set forth in Bar Rule 4-201 *et seq*. (*See* Defendant's exhibit 8).

2.

Plaintiffs challenge the following Disciplinary Standards: Standards 5(a)(2), (3), and (4); 6(a) and (b), (d)(4); 7(a); 8; 12; 13(a) and (b); 16; 17(a); 18; 26; and 30, as well as Disciplinary Rule 18. Plaintiffs also challenge the following state statutes: O.C.G.A. § 15-19-55; 15-19-56; 15-19-57(2)(3); 15-19-58(2), (3), & (4); O.C.G.A. § 16-10-95(a)(3); 35-1-9, and 33-24-53.

3.

On October 27, 1995, defendant filed a motion to dismiss plaintiffs' complaint on the grounds that there are ongoing State Bar disciplinary proceedings involving plaintiffs Falanga and Chalker and therefore, this Court should abstain from exercising its jurisdiction under the *Younger* doctrine. *See Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). After a hearing was held on the matter, the parties resolved the *Younger* issue among themselves by adding Ralph Goldberg as a party plaintiff and, on February 20, 1996, submitted the following stipulation to the court: "*Younger* is taken out of the case. Falanga or Chalker will not challenge any of the charges that the State Bar believes are pending against Falanga or Chalker as stated in the pretrial order by defendant. Ralph S. Goldberg will be added as party plaintiff to challenge the standards that the State Bar believes are pending against Falanga and Chalker. It is agreed that neither Falanga or

Chalker will be prosecuted until the District Court issues a final judgment. Falanga and Chalker agree that any argument based on delay because of the State Bar's forbearance is waived."

4.

Plaintiffs have withdrawn their First Amendment challenge to Standards 26 and 30. Furthermore, plaintiffs and defendant concede that Standard 6(a) is not a prohibition involving any speech and therefore, this Court need not address the constitutionality of this standard. Standards 5(a)(4), 6(d)(4) and 13(a) are presently before the Supreme Court of Georgia for consideration of the defendant's petition requesting that Standards 5(a)(4) and 13(a) be eliminated and that Standard 6(d)(4) be altered. Defendant has stipulated that these standards will no longer be enforced as they currently exist. Therefore, the Court defers ruling until the defendant has had a reasonable opportunity to secure a decision from the Georgia Supreme Court with regard to defendant's petition. Plaintiffs' constitutional challenge as to Standards 5(a)(4), 6(d)(4) and 13(a) is dismissed without prejudice to plaintiffs' right to attack these standards if the Supreme Court does not act favorably on the State Bar's request.

First Amendment Challenge

5.

As commercial speech, restrictions on attorney advertising are evaluated under the framework established by the United States Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557,

100 S. Ct. 2343 (1980). *Florida Bar v. Went-For-It, Inc.*, 115 S. Ct. 2371, 2376 (1995). Under *Central Hudson*, the government, may regulate commercial speech that concerns unlawful activity or is misleading. *Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. at 2350. Other commercial speech also may be regulated if the government satisfies the following: (1) the government must establish a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be "narrowly drawn." *Id.* at 564-65, 100 S. Ct. at 2350-51.

6.

The *Central Hudson* standard does not permit the court to supplant the precise interests put forward by the State with other suppositions. *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). In the present case, the State Bar has asserted the following interests in support of the challenged standards of conduct: (1) the regulation of the legal profession; (2) prevention of consumer harm by assuring that communications about legal services are accurate, complete and not misleading to potential clients; (3) protection of the privacy rights of Georgia citizens; (4) prevention of the consumer harm by restricting those aspects of legal advertising and solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct; and (5) cessation of the erosion of confidence in the profession that is engendered by invasive methods of legal advertising.

7.

The court finds that the State Bar has a substantial interest in the areas asserted. A state, as part of its power to protect public health and safety, as well as other valid interests, had broad power to regulate the practice of professions. *Went-For-It*, 115 S. Ct. at 2376; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912, 1920 (1978). States bear a "special responsibility for maintaining standards among members of the licensed professions." *Ohralik*, 436 U.S. at 460, 98 S. Ct. at 1920 (citing *Williamson v. Lee Optical Co.*, 348 U.S 483 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935)). The State Bar's interest in regulating lawyers "is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " *Ohralik*, 436 U.S. at 460, 98 S. Ct. at 1920.

8.

Furthermore, the protection of a potential client's privacy has been recognized as a substantial state interest. *Edenfield*, 113 S. Ct. at 1799. The Supreme Court has also recognized that the Bar has a substantial interest in protecting injured citizens "from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered." *Went-For-It*, 115 S. Ct. at 2381. Finally, the state has a substantial interest in ensuring the accuracy of commercial information in the market place. *Edenfield*, 113 S. Ct. at 1799.

9.

With regard to the last two *Central Hudson*, factors, "the burden of justifying the [standards] falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense . . . " *Penn Advertising of Baltimore, Inc. v. Mayor and City Council*, 63 F.3d 1318, 1323 (4th Cir. 1995). While the Court in *Went-For-It* reiterated the principle that the government may not support a regulation by mere speculation and conjecture, it also acknowledged that anecdotal evidence is an acceptable method of proof. *Went-For-It*, 115 S. Ct. at 2377. With regard to the Court's recent decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), although the rationale of the holding of that case is less than clear to this court, it apparently does not substantially change existing law, at least insofar as it is applicable to the issue of attorney advertising and the facts of this case. *Id.*

10.

In determining whether there is sufficient "fit" between the standards and the interests to be served, it is not necessary to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. "The proper standard for approval must involve an assessment of the reasonableness of the [State Bar]'s belief that the means it selected will advance its ends." *Penn Advertising*, 63 F.3d at 1325, (quoting *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995)); *See Messer v. Douglasville*, 975 F.2d 1505, 1513 (11th Cir. 1992) (upholding regulation that was not substantially broader

than necessary even though less restrictive alternative available).

11.

William P. Smith, III is the General Counsel for the State Bar of Georgia. He has held this position for twelve years. Acting as the Chief Disciplinary Counsel, he enforces the Standards of Conduct. He also participates in the National Organization of Bar Counsel which deals with the common concerns related to the regulations of the profession in the United States and Canada. In these positions he has received and considered numerous consumer complaints regarding the conduct of attorneys which members of the public consider offensive.

12.

Defendant produced evidence in the form of a survey conducted by Dr. Cathy J. Cobb-Walgren and Dr. Kenneth L. Bernhardt ("Georgia Survey") (Defendant's exhibit 7). Dr. Bernhardt testified as to the methods used in conducting the survey as well as to the results of the survey. According to the results of the Georgia Survey, while consumers generally favor legal advertising, the more intrusive the advertising method used, the more negative the attitude towards attorneys who advertise in that medium. The Yellow Pages generated the most favorable response. Respondents were 27 percent favorable and 40 percent unfavorable toward television advertising. Respondents were one-fourth favorable and one-half unfavorable toward direct-mail. As to attorneys who use

telemarketing, 58 percent viewed them unfavorably while only 13 percent of respondents viewed them favorably.

13.

Forty percent of respondents rated lawyer advertising as very influential or influential in shaping their overall impression of lawyers. Fifty-eight percent agreed with the statement that "Advertising by lawyers has reduced the public's respect for the legal system." About forty percent of the sample agreed with the statement "Advertising has lowered the dignity of the legal profession." These consumers were even more likely to agree that attorney advertising has reduced the public's respect for the legal system than were the respondents in a survey of Georgia consumers conducted in 1988-1989.

14.

The results of the survey show that miscomprehension levels for commercials ranged from 26 percent to 45 percent. The average for miscomprehension across all commercials was 35 percent. Several factors appeared to impact miscomprehension levels. First, the higher the education, the lower the miscomprehension. Also, miscomprehension was lower for those respondents who knew the most attorneys personally. The comprehension levels were significantly higher for print ads than for television ads, possibly because individuals have more control over the processing of print material because they can control the pace of processing the material themselves.

15.

In regard to the attorney selection process, "referral" was the dominant method used by respondents in selecting or learning about their most recently used attorney. Those who were more likely to consider mass media advertising as important in selecting an attorney were aged 18-24 with high school education or less, incomes under $15,000 and with little knowledge of attorneys or the legal system.

16.

Lower-income people were most likely to agree that "Lawyers are important to society because they protect everyone's legal rights." The lowest educated group was most likely to believe that "Lawyers are more concerned about the best interest of their clients than they are about making money." However, when respondents were asked about their level of agreement with other statements, the strongest agreement was with these statements: "Justice is bought and sold in our legal system" and "Lawyers clog up the court system with unnecessary lawsuits." About half of the respondents agreed that "Lawyers track down injured people and try to talk them into taking legal action." However, the statement, "Lawyers are important to society because they protect everyone's legal rights" also received about fifty percent agreement.

17.

Plaintiffs Falanga and Chalker are attorneys licensed to practice in the State of Georgia. Eighty percent of their

practice consists of representing plaintiffs in automobile accident litigation. They also handle medical malpractice, product liability, "slip and fall," worker's compensation and insurance bad faith litigation. Many of their clients are poor and uneducated.

18.

Falanga described his marketing plan which includes direct mail and networking of referral sources. Plaintiffs also presented the testimony of two chiropractors who described the referral system from their perspective.

19.

Dr. Richard Cebula is an economics professor at the Georgia Institute of Technology. He offered his opinion as to the reliability of the Georgia Survey, as well as an overview of the history of lawyer advertising and various studies that have been conducted as to the impact of advertising on the opinion of the consumer, which he researched and prepared in anticipation of his testimony. Dr. Cebula criticized the Georgia Survey as unrepresentative because it was conducted at various regional malls. Dr. Cebula stated that, as an economist, he preferred empirical data, such as United States Labor Department statistics, rather than opinion surveys, such as the Georgia Survey, because opinions cannot be quantified. Dr. Cebula also stated that his review of various studies leads him to believe that lawyer advertising has had a small positive benefit, or at the very worst, a negligible impact on the image of the profession.

Standards

20.

Each of the challenged standards must be evaluated separately to determine whether it does not sweep more broadly than necessary to serve the defendant's substantial interests.

> **Standards 5.**
>
> **(a) A lawyer shall not make any false, fraudulent, deceptive, or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: . . .**
>
> **(2) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the disciplinary rules or other law;**
>
> **(3) compare the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated; . . .**

21.

The State has a substantial interest in assuring the free flow of accurate information in the commercial market place. *See generally, Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691 (1977). The Supreme Court has recognized that a communication which offers "overblown assurances of client satisfaction" may be misleading. *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 479, 108 S. Ct. 1916, 1925 (1988). *See Bates,* 433 U.S. at 383-84, 97 S. Ct. at 2709 (stating advertising claims as to the quality of

legal services may be so misleading as to warrant restriction).

22.

Standard 5(a)(2) is intended to reduce false, fraudulent or misleading advertising and therefore, is clearly the type of commercial speech regulation to which the Supreme Court has applied lesser scrutiny. *Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. at 2350 (government may ban forms of communication which are more likely to deceive the public than inform it). Standard 5(a)(2) is directed toward communications that are "likely to create an **unjustified** expectation about the results the lawyer can achieve . . . " (emphasis added). Defendant presented evidence which suggests that those consumers who are most likely to use advertising to select an attorney are also the same consumers who are more likely to experience greater miscomprehension of the commercial message. Defendant also presented evidence regarding consumers who had been misled by attorney advertising which created unjustified expectations regarding results.

23.

Standard 5(a)(2) also prohibits communications that state or imply that the lawyer "can achieve results by means that violate the disciplinary rules or other law." Government may ban forms of commercial speech related to illegal activity. *Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. at 2350. Such a ban need not be restricted to the service of some substantial governmental interest. Furthermore, the government has a substantial interest in

protecting the public from attorneys who would use speech which is violative of the law to promote the attorney's services. It is inherently misleading and improper for an attorney to state that he can achieve results by means which violate the disciplinary rules and, furthermore, the Bar has a substantial interest in protecting the public against such communications. Standard 5(a)(2) is not an absolute ban on results-oriented advertising. Attorney's simply must have prior justification for any claims made.

24.

Standard 5(a)(3) likewise is not an absolute ban on communications that compare the quality of one lawyer's services to that of another lawyer. The standard merely restricts misleading comparisons by requiring factual substantiation of any comparison made. *See generally, Bates,* 433 U.S. 350, 97 S. Ct. 2691 (1977).

25.

The Court finds that Standards 5(a)(2) and 5(a)(3) provide a reasonable means for achieving the State's goal of assuring the free flow of accurate information in the market place and, therefore, do not violate the First Amendment's protection of commercial speech. Accordingly, Standards 5(a)(2) and 5(a)(3) are not unconstitutional for any of the reasons asserted.

26.

Standard 6.

(b): Written communications to a prospective client for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in typesize no smaller than the largest typesize used in the body of the letter. . . .

27.

The State Bar asserts that this Standard is primarily directed at three goals (1) preventing communication to consumers that is misleading by omission, (2) protecting consumers from invasion of privacy, and (3) reducing the anxiety that consumers experience upon receiving an unexpected letter from an attorney. The Supreme Court has recognized that lawyers may be required to stamp "advertisement" upon their solicitation letters without running afoul of the First Amendment. *Shapero,* 486 U.S. at 476-78, 108 S. Ct. at 1923-24. In *Shapero,* the Court struck down an absolute ban prohibiting lawyers from sending direct-mail solicitation letters to consumers, finding that this absolute ban was not justified by the mere potential that a mistake might occur in the delivery. *Id.* at 1925. However, the Court recognized that a personalized letter from a lawyer presents risks of deception and suggested, in *dicta,* that the State could require the letter to bear a label identifying it as an advertisement. *Id.* at 477, 108 S. Ct. at 1924.

28.

In *Texans Against Censorship v. State Bar of Texas*, 888 F. Supp. 1328 (E.D. Tex. 1995), the district court recognized that personalized letters from attorneys which do not contain the affirmative disclosure "Advertisement" may invoke anxiety. *Id.* at 1360. The court stated:

> Many of these citizens find the solicitation letters distressing, especially when the letters arrive shortly after a traumatic event. The requirement that such letters, and the envelopes enclosing them, be stamped 'ADVERTISEMENT' is likely to reduce the anxiety such letters cause consumers, because they will know immediately that they are only advertisements, and do not contain other, more evocative messages.

Id.

29.

Similar harm has been experienced by consumers in Georgia. The State Bar presented the testimony of Kay Sterniolo who stated that, upon receiving an unexpected letter from a law firm that was not marked "Advertisement," she mistakenly believed that someone was suing her. She further testified that she was annoyed by this letter and that, had she known it was an advertisement, would not have viewed it as imperative to open it but could have considered whether to disregard the letter. Smith and Davis also testified that they received complaints regarding the offensive nature of such mailings. In the experience of Smith and Davis, such mailings tend to erode consumer confidence in the legal profession. While

the standard at issue in this case does not appear to be limited to personalized or targeted communications, the court finds that the same considerations recognized by the Supreme Court in *Shapero* and the District Court in *Texans Against Censorship*, are present in this case. The State Bar has provided sufficient evidence of the harm that the standard seeks to prevent.

30.

The court also finds that the regulation is a reasonable means of preventing the harms asserted by defendant. The word "advertisement" has a common meaning and understanding among most members of the general public. Dr. Bernhardt testified that the word "advertisement" is generally understood by consumers and serves as an affirmative disclosure. Posted on an envelope or letterhead, "Advertisement" gives the reader additional information about the context of the written material. This allows the consumer to choose whether to discard the envelope without reading the material and the opportunity to read the communication knowing from the start that it is an advertisement.

31.

Although plaintiffs assert that the designation of "advertisement" deprives the consumer of the opportunity to read the communication, the court finds this argument to be disingenuous. While a more elaborate and burdensome disclaimer might dilute the central message, nothing about the single word "advertisement" prevents

the consumer from reading and understanding the material. Rather, the designation allows the consumer to **choose** whether he or she is interested in the information it contains and prevents the communication from being misleading by omission. *See Texans Against Censorship*, 888 F. Supp. at 1360-61 (stating that it is the consumer's right to choose to dispose of attorney solicitation letter without reading it). Accordingly, Standard 6(b) is not unconstitutional for any of the reasons asserted by the plaintiffs.

32.

Standard 7.

(a): A public communication for which the lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication. . . .

33.

The State Bar asserts that this standard is intended to assure that communications about legal services are accurate, complete and useful to the potential client. It allows the consumer to know whether the event that is the subject of the communication was newsworthy in its own right or if the communication was purchased. The requirement provides the consumer with additional information and reduces the possibility of consumer confusion.

34.

The First Amendment protection to commercial speech is justified because of the value to consumers of the information such speech provides. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S. Ct. 2265, 2282 (1985). For this reason, the Supreme Court has stated that a plaintiff's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* Disclaimers may be appropriate in order to reduce the possibility of consumer confusion. *Id.*

35.

Dr. Bernhardt testified that advertisements can be equally misleading due to a material omission. Moreover, common sense dictates that an advertisement can be misleading if it leaves out information that is necessary for a complete and accurate assessment of the message. The State Bar has a substantial interest in reducing consumer confusion and thereby insuring the accurate flow of information. This interest is served by Standard 7(a) which provides additional information to the consumer as to the impetus of the communication, allowing the consumer to evaluate more accurately the usefulness of the particular communication in deciding whether to use the lawyer's services. *See e.g., Zauderer*, 471 U.S. at 652, 105 S. Ct. at 2282 (finding advertising misleading which did not disclose complete information regarding legal fees). This requirement for affirmative disclosure is a reasonable means to ensure that communications regarding legal services are accurate and complete. It does not impose any undue burden on the lawyer. Standard 7(a) is an

entirely appropriate requirement. Therefore, the court finds that Standard 7(a) is not unconstitutional for any of the reasons asserted.

36.

Standard 8.

A lawyer shall not use a firm name, professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing or similar professional notice or designation that includes a statement that is false, fraudulent, deceptive or misleading. A statement or claim is false and misleading if it violates the provisions of Standard 5.

37.

Plaintiffs' claim regarding Standard 8 relates to plaintiffs' claims that Standards 5(a)(2) & (3) are unconstitutional. As previously discussed, this court found that Standard 5 was not unconstitutional. Therefore, Standard 8 is not unconstitutional for the same reasons set forth in the discussion of Standard 5.

38.

Standard 12.

A lawyer shall not solicit professional employment as a private practitioner for himself, his partner or associate through direct personal contact with a non-lawyer who has not sought his advice regarding employment of a lawyer.

39.

The State Bar asserts that it has a substantial interest in protecting the public from those aspects of solicitation that involve fraud, undue influence, intimidation and overreaching. The State Bar also asserts that it has a substantial interest in protecting the tranquility and privacy of personal injury victims and their loved ones against intrusive, unsolicited in-person contact from lawyers and the subsequent detrimental effects such conduct has on the public perception of the legal profession. *See Went-For-It*, 115 S. Ct. at 2379.

40.

The State Bar argues that this rule is justified by the holding of *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912 (1978). In *Ohralik*, the Supreme Court upheld disciplinary action against an attorney who approached a potential client in her hospital room after a serious accident. *Id.* The State Bar also points to evidence that lawyers have engaged in false, fraudulent, and misleading direct-mail solicitation to show that lawyers who are inclined to use false written communication will be just as likely to engage in direct in-person communication that is false or misleading. The defendant asserts that the risk of overreaching or fraud is high with direct in-person solicitation and that such solicitation is extremely difficult to monitor. Therefore, the bar claims that an absolute ban is a necessary prophylatic rule.

41.

At trial, this court granted plaintiffs' motion for directed verdict as to Standard 12, relying principally upon *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), decided subsequent to *Ohralik*. In *Edenfield*, the court struck down a ban on in-person solicitation by certified public accountants. *Id*. The Court stated that "*Ohralik* in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." *Edenfield*, 113 S. Ct. at 1803.

42.

The Court recognizes that the interests asserted by the State Bar are substantial and important, however, the court finds that the State Bar has not demonstrated that this ban on direct in-person attorney solicitation advances its asserted interests in any direct and material way. Although the defendant's anecdotal evidence demonstrates certain harms that may be associated with in-person solicitation, the court finds that the Bar has failed to demonstrate that these harms are present in all circumstances. Furthermore, the court finds that Standard 12 is substantially broader than necessary to prevent the harms asserted by the State Bar. Therefore, Standard 12 is not a "reasonable fit" between the ends sought and the means used to obtain those ends. Accordingly, Standard 12 is unconstitutional. The State Bar is hereby enjoined from enforcing Standard 12 and from disciplining any member of the State Bar of Georgia for soliciting and

encouraging the institution of a judicial or administrative proceeding, or offering assistance therein, before being consulted by a complainant in relation thereto.

43.

Standard 13.

(b) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client; except that he may pay for public communications permitted by Standard 5 and the usual and reasonable fees or dues charged by a bona fide lawyer referral service operated by an organization authorized by law and qualified to do business in this state; provided, however, such organization has filed with the State Disciplinary Board, at least annually a report showing its terms, its subscription charges, agreements with counsel, the number of lawyers participating, and the names and addresses of lawyers participating in the service.

44.

The State Bar asserts that Standard 13(b) serves to promote the state's interest in ensuring the independence of lawyers by minimizing the number of situations in which lawyers will be motivated by economic interest incentives rather than by their client's best interest. The conduct prohibited under Standard 13(b) is a form of fee-sharing. Through this standard, the Bar seeks to eliminate the potential for conflicts of interest between lawyer and

client by specifying and regulating a particular type of relationship where such a conflict is likely to arise.

45.

Falanga and Chalker testified that 25% of their practice consisted of referrals from chiropractors with whom they have previously made contact, either directly or indirectly. Part of Falanga's "marketing plan" consisted of networking with the chiropractors. Falanga would meet with the doctors to tell them about his firm, occasionally taking them to lunch, and ask them to recommend his firm to their patients. Falanga also hired persons to meet with the chiropractors and other health professionals. This "public relations" person would meet with the chiropractors to inquire as to whether they were satisfied with the attorneys' work. Falanga testified that he would make sure that the doctor was happy with the way his firm handles the cases that had been referred. Falanga recognized that part of "making the doctor happy" included ensuring that the doctor was paid for the services rendered to the patient who had been referred. Often, the only payment a chiropractor receives for the treatment of a patient (who is also the client to Falanga) is paid from any settlement for medical bills reached by Falanga. While Falanga did not pay the doctors for referrals, he would provide them with free legal advice regarding various matters, including assistance in collecting from insurers.

46.

Plaintiffs also presented testimony from two chiropractors regarding these referral arrangements. Both acknowledged that their bills for services have been challenged as excessive by insurance companies in the past. On some occasions, the insurance companies have refused to pay the bill or have negotiated with the doctor to reduce the bill. The Bar asserts that the conflict of interest arises because, in those instances where a chiropractor's bill is to be paid out of settlement proceeds, an attorney who has benefited from the doctor's referral may be less inclined to scrutinize the doctor's bill for fear of alienating him and losing his referrals. An attorney dependent on the chiropractor's referrals for a substantial portion of his business is likely to have a conflict between his client's best interests and the continued relationship with the doctor.

47.

The restrictions in Standard 13(b) serve to advance the State's substantial interest in promoting the independent judgment of lawyers and prohibiting the practice of law by a layman. *See Lawline v. American Bar Ass'n*, 738 F. Supp. 288, 296 (1990) ("prohibitons on aiding nonlawyers in the unauthorized practice of law and on forming partnerships with nonlawyers if any of the activities of the partnership consist of the practice of law do not violate any First Amendment guarantees."), *aff'd*, 956 F.2d 1378 (7th Cir. 1992). The court finds that there is an inherent risk for conflict of interest under circumstances such as those described above and that Standard 13(b)

bears a direct relationship on preventing such conflict from arising.

48.

The State Bar also asserts an interest in protecting consumers from overreaching by those to be compensated. *See Ohralik*, 436 U.S. at 464, 98 S. Ct. at 1923, n. 22. Smith testified that the State Bar has received regular complaints regarding aggressive advertising and solicitation methods of attorneys. In particular, Smith cited the use of "runners" to acquire personal injury clients. "Runners" are individuals who are paid for referring potential clients. These runners, who are motivated by personal financial gain, have every incentive to make misrepresentations to the potential client in order to gain the client's business for the attorney and, thus, keep the attorney happy and willing to pay the runner. Smith testified that the bar has no authority to regulate or prosecute the conduct of the non-lawyer runner. The court finds that prohibiting lawyers from engaging in the practice of paying for referrals is a reasonable method of preventing the harm caused by the overreaching of certain runners, which has prompted complaints to the Bar by the public. In light of the foregoing, the court finds that Standard 13(b) is not unconstitutional for the reasons asserted.

49.

Standard 16.

A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct

by any person or organization prohibited under Standards 12, 13, 14, or 15.

50.

Plaintiffs have not challenged the prohibitions contained in Standards 14 and 15, therefore, the plaintiffs have not challenged the constitutionality of Standard 16 as it relates to Standards 14 and 15. Standard 16's prohibition in relation to the prohibitions contained in Standard 13 is not unconstitutional for the reasons set forth in the discussion of Standard 13(b). Standard 16 is unconstitutional only to the extent that it seeks to prohibit in-person solicitation, for reasons discussed under Standard 12.

49.

Standard 17.

A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except: (a) A lawyer may accept employment from a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

52.

Standard 17(a) is unconstitutional for the reasons set forth in the court's discussion of Standard 12. Accordingly, defendant is enjoined from enforcing Standard 17(a) and prosecuting a grievance against an attorney for

accepting employment from a layperson to whom he has given unsolicited legal advice or to whom he has recommended the taking of legal action.

53.

Standard 18.

A lawyer may communicate the fact that the lawyer does or does not practice in a particular field of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation; (b) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty," or a substantially similar designation; and

(c) A lawyer who has been certified as a specialist in a particular field of law or law practice as a result of having successfully completed a program of legal specialization approved by the State Disciplinary Board of the State Bar of Georgia may publicly communicate the fact that he has satisfied the requirements of that particular program.

54.

The State Bar claims a substantial interest in protecting consumers from misleading attorney advertising. The

State Bar contends a substantial risk exists that consumers are likely to infer that the term "specialist" connotes that an attorney's qualifications in a particular area of practice exceed the general qualifications for admission to the State Bar. Plaintiffs respond that their potential clients frequently inquire as to whether they "specialize" in a particular area of law and therefore could not be misled by the use of the word "specialist." However, plaintiffs' evidence does not distinguish between those clients who are seeking information as to the special training a lawyer has had in a particular area of law (much as a medical doctor who receives additional training in a particular system of the body may be a "specialist") and those clients who simply want to know if the lawyer practices in a particular area of law (although no special training is required by the Bar to so limit his practice). Defendant presented evidence, through the Georgia Survey, which demonstrates that there is considerable miscomprehension by consumers with respect to lawyer advertising. The results of the survey indicate that those most likely to use legal advertising for selecting an attorney frequently have little or no experience with lawyers or the legal system. These same individuals experienced higher levels of miscomprehension with respect to the content of legal advertising. The court finds that the defendants have demonstrated a substantial likelihood that the use of the word "specialist" could be misleading to consumers and that Standard 18 is a reasonable means for regulating its use to reduce or eliminate consumer confusion.

55.

The Supreme Court has held that a State Bar cannot categorically ban a lawyer's ability to advertise his certification as a specialist. *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 110-112, 110 S. Ct. 2281, 2291-93. However, "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of the specialty." *Id.* at 110, 110 S. Ct. at 2292.

56.

Standard 18 is not an absolute ban prohibiting lawyers from listing their areas of practice in advertisements. However, a lawyer who wishes to hold himself out as a "specialist" (in other than the areas of patent and admiralty) must show that he has "successfully completed a program of legal specialization approved by the State Disciplinary Board." The saving feature of Standard 18 is subsection(c), particularly in light of the bar's representation that it would entertain additional categories of "specialist" at the request of a particular practice group or area of law, and in the absence of a showing by plaintiffs that the State Bar has acted in an unreasonably restrictive manner in designating new specialties. Therefore, Standard 18 is not unconstitutional for any of the reasons asserted by plaintiffs.

Statutes

57.

Plaintiffs also challenge the constitutionality of several statutes enacted by the Georgia Legislature. Defendant asserts that it cannot enforce the challenged sections of the Official Code of Georgia, by virtue of the creation of the unified Bar in 1963 and, therefore, it is not a proper party as to plaintiffs' challenge to the statutes. The court agrees that it is questionable as to whether the State Bar has the authority and/or is the proper party to resist a constitutional attack on a state statute. However, in this case, it is not necessary for the court to resolve the issue of the constitutionality of the enforcement of the state statutes inasmuch as the State Bar has conceded that they have not, do not, and will not enforce the statutes in question. *See Attwell v. Nichols*, 466 F. Supp. 206, 209 (N.D. Ga. 1979) (power over State Bar is judicial not legislative), *aff'd*, 608 F.2d 228 (5th Cir. 1979); *Carpenter v. State*, 250 Ga. 177 (1982) ("Matters relating to the practice of law, including the admission of practitioners, their discipline, suspension and removal, are within the inherent and exclusive power of the Supreme Court of Georgia.") Accordingly, plaintiffs' constitutional challenges asserted against the state statutes are DISMISSED against the State Bar.

Vagueness Challenge

58.

Plaintiffs contend that all of the challenged Standards of Conduct are unconstitutionally vague. In order to

show that a regulation is facially invalid, "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 1193 (1982). In other words, the plaintiffs must establish that the Standards are " 'so vague and indefinite as really to be no rule or standard at all.' " *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 965 F. 2d 1030, 1036 (11th Cir. 1992) (quoting *Boutilier v. INS*, 387 U.S. 118, 123, 87 S. Ct. 1563, 1566 (1967)). The test to determine if regulatory prohibitions are unconstitutionally vague is whether "they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579, 93 S. Ct. 2880, 2897 (1973). Guidance on the issue can be gained by considering the particular context in which a regulation has been promulgated. *Howell v. State Bar of Texas*, 843 F.2d 205, 208 (5th Cir. 1988). In *Howell*, the court denied a vagueness challenge to a state bar rule prohibiting lawyers from "engaging in conduct that is prejudicial to the administration of justice," finding that lawyers have the benefit of guidance provided by case law, court rules and the lore of the profession to assist them in understanding the application of the rule. *Id.*

59.

Likewise, lawyers in the State of Georgia have these same tools available to assist them in interpreting and applying the challenged Standards of Conduct. Furthermore, the State Bar provides guidance to attorneys who

are unsure as to whether particular conduct falls within the scope of a standard's prohibitions. Attorneys may seek formal or informal advisory opinions regarding specific issues. Considering the challenged standards of conduct and the context within which they were promulgated, this court finds that the standards are not unconstitutionally vague.

Equal Protection Challenge

60.

Plaintiffs claim that certain standards of conduct are violative of "equal protection" as a component of Fourteenth Amendment protection. Specifically, plaintiffs contend that the State Bar routinely enforces certain standards of conduct against Plaintiff attorneys while failing to prosecute Defense attorneys for similar violations. Plaintiffs presented no evidence demonstrating that the State Bar refused to prosecute an attorney in the Defense Bar after a grievance had been filed against him, while pursuing the same type of prosecution against a member of the Plaintiff Bar. The General Counsel of the State Bar of Georgia has assured the court that the State Bar had and would prosecute attorney misconduct equally, without regard to whether the attorney is primarily a member of the Defense Bar or the Plaintiff Bar. Furthermore, within the context of commercial speech, if there is a sufficient "fit" between the defendant's means and ends to satisfy the concerns of the First Amendment, the same fit is adequate under the applicable rational basis equal

protection analysis. *Don's Porta Signs, Inc. v. City of Clearwater,* 829 F. 2d 1051, 1054, n. 10 (11th Cir. 1987) (holding that because regulation passes muster under the *Central Hudson* test, plaintiff's claim based on equal protection must fail). Accordingly, plaintiffs' equal protection challenge to the remaining standards fails.

Procedural Due Process Challenge

61.

Procedural Rules of the Investigative Panel: Rule 18 – Extension of Time Within Which a Formal Complaint May be Filed:

The Chairperson or chair-designee may extend the time within which the Investigative Panel may file its formal complaint with the State Supreme Court for good cause shown.

62.

Plaintiffs challenge Rule 18 of the internal rules of the State Bar's Investigative Panel as a violation of their procedural due process rights. Specifically, plaintiffs claim that Rule 18's provision for granting the Investigative Panel an "indefinite extension" in which to file a formal complaint prejudices a respondent attorney because there is no specific time limit for the extensions.

63.

The Investigative Panel cannot consider probable cause for the violation of a standard of conduct unless the

attorney has been notified of the alleged violation and has had the opportunity to respond. *See* Rule 4-201.1. Smith testified that, at the time an extension is issued to the Investigative Panel, the attorney is aware of the alleged violations and the facts supporting the charged violations through the "Notice of Grievance." The attorney also has been notified as to which Investigative Panel Member has been assigned his case. Smith also testified that the attorney may contact the Investigative Panel Member or the Office of General Counsel at any time to learn of witnesses, evidence and the status of the matter. Because the applicable discovery rules are the same as those in civil cases in the State of Georgia, attorneys are able to obtain and preserve evidence during the extension.

64.

Furthermore, an attorney who feels that the extension rule has been unconstitutionally applied may raise a procedural due process challenge in the course of the disciplinary proceeding. *See Cohran v. State Bar of Georgia,* 790 F. Supp. 1568, 1571 (1992). Any delay in the disciplinary proceedings may be considered as a mitigating factor when making a final determination of the alleged violations.

65.

In order to justify relief for a procedural due process violation in an administrative proceeding, there must be a showing of substantial prejudice. *United States v. Lober,* 630 F.2d 335, 336 (5th Cir. 1980). Plaintiffs have presented

no authority to support the proposition that even a three year extension for the filing of the formal complaint presents undue delay constituting a per se violation. *See United States v. Medina-Arellano*, 569 F.2d 349, 352 (5th Cir. 1978) (holding that four year delay before indictment or arraignment in criminal case did not violate due process absent showing of prejudice by defendant). There has not been a sufficient showing of prejudice to support a holding that Rule 18 allows for impermissible delay. Therefore the court finds that respondent attorneys have an adequate opportunity to respond and defend against allegations of violations of the standards of conduct. Accordingly, Investigative Panel Rule 18 is not unconstitutional for the reasons asserted.

66.

On July 12, 1996, defendant filed a motion to re-open the trial record in this case. The trial of this case ended on May 10, 1996. Defendant has not demonstrated a sufficient reason to re-open the trial record and allow this matter to become a continuing, unlimited endeavor. Accordingly, Defendant's motion to re-open the trial record [docket no. 37] is DENIED.

Summary

The court finds in favor of the Defendant with regard to plaintiffs' constitutional challenges related to Standards 5(a)(2) & (3); 6(b); 7(a), 8, 13(b), 16 (except as it relates to Standard 12) and 18, and Disciplinary Rule 18. Plaintiffs' claims with regard to Standards 5(a)(4); 6(d)(4) and 13(a) are DISMISSED without prejudice. Standards

12, 16 (but only as it relates to Standard 12) & 17(a) are unconstitutional under the First Amendment. Defendant is hereby enjoined from enforcing these standards and from disciplining any member of the State Bar of Georgia for soliciting and encouraging the institution of a judicial or administrative proceeding, or offering assistance therein, before being consulted by a complainant in relation thereto. Defendant's motion to reopen the trial record in this case [docket no. 37] is DENIED.

SO ORDERED, this 18 day of July, 1996.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL, JUDGE
UNITED STATES
DISTRICT COURT